

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CRIMINAL APPLICATION No. 576 of 2005****For Approval and Signature:****HONOURABLE MR.JUSTICE S.R.BRAHMBHATT**

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1 Whether Reporters of Local Papers may
be allowed to see the judgment ?

2 To be referred to the Reporter or not
?

3 Whether their Lordships wish to see
the fair copy of the judgment ?

Whether this case involves a
substantial question of law as to the

4 interpretation of the constitution of
India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the
civil judge ?

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KAMALBENS.BHALERAO & 4 - Petitioners

Versus

STATE OF GUJARAT & 19 - Respondents

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Appearance :

MR KIRTIDEV R DAVE for Applicant(s) : 1 - 5.
MR KC SHAH ADDL PP for Respondent(s) : 1,
RULE SERVED for Respondent(s) : 2,
MR RAHUL K DAVE for Respondent(s) : 3 - 7, 9, 11, 13,
15, 17, 19,
DELETED for Respondent(s) : 8, 10, 12, 14, 16, 18,
20,

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 13/10/2005

ORAL JUDGMENT

- 1.The petitioners have filed this petition under Article 227 of the Constitution of India challenging the order passed by the learned Judicial Magistrate First Class, Vankaner dated 10th March, 1999 below Ex.35 in Criminal Case No. 166 of 1998 and also the order dated 15.1.2005 passed in Criminal Revision Application No. 16 of 1999 confirming the order of the learned Judicial Magistrate First Class, Vankaner rejecting the application for discharge in connection with the complaint alleging offence under Sections 2(ix)(k), Rule 32(e), Section 7(2) and (7) and Section 16 of the Prevention of Food Adulteration Act, 1954.
2. This court issued Rule vide order dated 29.4.2005 and the matter was posted for final hearing. Shri Dave, learned counsel appearing on behalf of the petitioner states at the bar that the grounds for discharge based on applicability of Rule 32(e) of

the Prevention of Food Adulteration Rules, 1955 (herein after referred to as 'the Rules' for short) is not available to the petitioners and hence, he does not press into service the submissions on this behalf. He requests that the matter be examined on the basis that, the grounds for discharge that have been urged before both the courts below in respect of Rule 32(e) of the Rules, are not available to the petitioners in view of the ruling of this court.

3. Shri Dave, learned counsel for the petitioners submits that the petitioners are the members of the Managing Committee of the respondent No. 3 Company and he produces on record the scheme for the Management and Administration of Shri Mahila Griha Udyog Lijjat Papad, which is ordered to be taken on record. He submits that the Company has not furnished any names before the concerned authority and therefore, under section 17 of the Prevention of Food Adulteration Act, 1954, the complainant has named all the Members of the Managing Committee as accused for the alleged offence. Shri Dave has

submitted that the trial Court as well as the revisional court ought to have appreciated the fact that in view of the specific provision under the Prevention of Food Adulteration Act, 1954 (herein after referred to as 'the Act' for short), only the person, in-charge of the day to day business of the firm can be subjected to the prosecution for the offences under the Act. The petitioners, who are not associated with the day to day functioning of the Rajkot Unit of the Company, therefore, could not have been subjected to the prosecution for the offences under the Act. This aspect ought to have been appreciated by the learned trial Court as well as the learned revisional court and therefore, extra ordinary jurisdiction under Article 227 of the Constitution of India is invoked by the petitioners for quashing and setting aside the impugned orders. The trial Court and the revisional court ought to have appreciated the submission on behalf of the petitioner that they were not in charge of the day to day affairs of the Rajkot Unit and therefore, the discharge application ought to

have been allowed.

4. Shri Dave has invited this court's attention to the ruling of this court in case of **GOPISHANKAR S. VAID VS. STATE OF GUJARAT** reported in 2001(1) GLR p.267 and **STATE OF GUJARAT VS. RATILAL MAGANLAL SHAH AND ORS.** reported in 1995(2) GLR p.1542 in support of his submission that the person, connected with the Company need not be subjected to the prosecution, if it is not proved that he was actually not responsible for the breach alleged. Shri Dave has also relied on one unreported judgment of this court in Criminal Revision Application No. 771 of 1983 passed by Hon'ble Mr. Justice B.S. Kapadia (as he then was) dated 25th September, 1984 to support his proposition that all responsible persons need not be joined and subjected to criminal trial and in case, if any evidence is found that they are responsible, then, it may be open to the prosecution to join them in the complaint. Shri Dave has also relied upon the decision in case of **M/s. PEPSI FOODS LTD. AND ANR. VS. SPECIAL JUDICIAL MAGISTRATE AND ORS.**

reported in 1997(9) Supreme p.279 in support of his submission that applications were maintainable for discharge before the trial Court as well as before the revisional court.

5.Thus, the sole contention of Shri Dave that looking to the scheme of the Act, 1954, the persons, who are not actually responsible in the commission of offence, cannot be subjected to criminal trial and therefore, the discharge application ought to have been allowed by the trial court and thus, the trial Court has erred in not allowing the discharge application and the revisional court has also erred in not appreciating this submission and therefore, the present petition deserves to be allowed.

6.Shri Shah, learned Addl.P.P. appearing on behalf of the State has submitted that Special Criminal Application under Article 227 of the Constitution of India is not maintainable when the petitioners have availed the statutory remedy of Revision under Section 397 of the Code of Criminal Procedure. The entertaining of petition against the order of the

Magisterial Court and also against that of revisional court, amounts to affording second revision, which is not maintainable in eye of law. Shri Shah has submitted that plain reading of Section 17 of the Act would clearly show that in absence of any nomination of responsible person of the Company, all those who are connected with the functioning of the Company, are liable to be prosecuted and named as accused in the complaint. He further submits that the submission of Shri Dave cannot be examined in absence of any evidence whatsoever and therefore, the decision of the trial Court as well as the revisional court are correct and they may not be interfered with. Shri Shah has submitted that factum of petitioners not being actually responsible for the alleged offence depend upon adducing and appreciating the evidence and therefore, at least this is not a case, wherein, straight way discharge application could have been allowed. He submitted that the orders impugned may not be interfered with and the petition may be dismissed. Shri Shah has submitted that even the

learned revisional court has observed in its judgment that the petitioners were responsible for protracting their trial and therefore, while dismissing the revision application, the revisional court has awarded cost of Rs.5000/-. Thus, the offence alleged is very serious and affecting the society's well being at large and when such an offence is being tried, there ought to have been an attempt of all responsible persons to cooperate in the trial and to complete the trial as soon as possible without resorting to such delay tactics. Shri Shah has submitted that in case, petitioners were not responsible for the offence alleged, then it was always open for them to make their case good before the trial Court and it is certainly not a case where straight way discharge of the accused is warranted.

7. The submission of Shri Dave, advocate for the petitioners deserves to be viewed in light of the offence alleged in the complaint. The original complainant has stated that Food Inspector Shri A.B. Vilaji in presence of the panch witness

collected the samples of Pepper powder packed and sold under the brand name of "Lijjat" on 26.7.1994 from the distributor accused No. 1. The accused Nos. 2 to 22 are the Members of Shri Mahila Gruha Udhog Lijjat Papad and accused Nos. 23 is the Manager of Shri Mahila Gruha Udhog Lijjat Papad, Rajkot Branch and accused No. 24 is the Producer. The sample food article was found to be misbranded on account of it being not in conformity with the Rules and lacking in details, which are statutorily required to be mentioned on the label. It is to be noted that design of the brand label is never an act of individual unit and it is approved by the Managing Committee. In view of this, the submission of Shri Dave in support of discharge deserves to be viewed keeping in mind the provisions of Section 17 of the Act. Section 17 of the Act deserves to be set out.

"Section 17 : Offences by companies : (1) where an offence under this Act has been committed by a company -

(a) (i) the person, if any, who has been nominated

under sub-section (2) to be in charge of, and responsible to, the company for the conduct of the business of the company (hereafter in this section referred to as the person responsible), or

(ii) where no person has been so nominated, every person who at the time the offence was committed was in charge of and was responsible to, the company for the conduct of the business of the company; and

(b) the Company,

shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of such offence....."

Thus, when no person has been so nominated as responsible for the day to day functioning of the Company, then every one at the time of committing

the offence, incharge of the Company is held to be responsible for conduct of the business of the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The proviso envisaged that the person would not be liable to any punishment, if he proves that the offence was committed without his knowledge and he exercised all due diligence for preventing the commission of such offence.

8. The scheme produced by Shri Dave on record contains item No. 13 indicating the rights and duties of the Managing Committee. The relevant part reads as under:-

"13(a) : The Managing Committee shall be responsible for the day-to-day functioning of the Society and shall have the right to the appointment and removal of the workers."

Shri Dave, learned advocate for the petitioner has submitted that this is only an enabling provision empowers the members to have their say in the day to day function in the society and therefore, that

itself cannot be said to be sufficient to subject the petitioners to criminal prosecution under Section 17 of the Act for the offence alleged.

9. The submission of Shir Dave is untenable in eye of law. The fact remains to be noted that the organisation in question had not nominated any person as required under the law to be person incharge and responsible for the conduct of the business of the Company. In absence of such nomination, the deeming provided under Section 17 of the PFA Act would come into play and every person who at the time of commission of offence was in charge of and was responsible in the company for the conduct of the business of the company; and the Company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The proviso to Section 17 (ii)(b) does provide for defence available to the persons so charged to prove that he was in fact not having any knowledge or that he exercised all due diligence to prevent such offence. This proviso, therefore, requires positive act of proving the

lack of knowledge in respect of the offence and proving of due diligence to prevent the commission of offence on the part of the persons subjected to prosecution by virtue of Section 17. Thus, only on account of the proviso, an application of discharge at the threshold of the trial was liable to be rejected.

10. The decision relied upon by Shri Dave in case of **GOPISHANKAR S. VAID VS. STATE OF GUJARAT** reported in 2001(1) GLR p.267 and **STATE OF GUJARAT VS. RATILAL MAGANLAL SHAH AND ORS.** reported in 1995(2) GLR p.1542 would be of no avail to the petitioners as in the instant case, the application for discharge was filed at the threshold of the trial only relying upon the proviso to Section 17, which requires positive proof of lack of knowledge and due diligence for preventing such offence on the part of the person, so charged for the commission of offence under the PFA Act. The ruling of the Apex Court in case of **M/s. PEPSI FOODS LTD. AND ANR. VS. SPECIAL JUDICIAL MAGISTRATE AND ORS.** reported in 1997(9) Supreme p.279 is also of no

avail to the petitioners as there cannot be any dispute that discharge application was maintainable at any time. The fact remains that only relying upon the proviso of Section 17 (ii)(b) of the Act, the discharge application was not liable to be allowed in absence of any positive proof in support of the contention of lack of knowledge or efforts of due diligence on the part of the petitioners.

11.The Apex Court in case of **STATE (DELHI ADMN.) VS. I.K. NANGIA AND ANOTHER**, reported in AIR 1979 SC p.1977 has observed as under:-

“para12 : On the plain meaning of the section, when an offence has been committed by a company, where there is no nomination under S.17(2), every person who at the time of offence was committed was in charge of and was committed was in charge of and was responsible to the company for the conduct of the business, is deemed to be guilty of the offence and is liable to be proceeded against and punished. Notwithstanding the nomination of a person under S.17 (2), any director, manager, secretary or other officer of the company (not being a person

nominated under sub-s (2)) can also be vicariously made liable if it is proved that the offence has been committed "with the consent or connivance of, or is attributable to any neglect on the part of such person."

"para13 : It is, however, strenuously urged that the company having nominated the accused Y.A. Khan, Quality Control Manager, Ahmed Mills to be the person responsible under S.17(2), he is the only person liable to be proceeded against throughout the country and the prosecution of the respondents is wholly misconceived. Our attention has been drawn to the nomination form, and it says that he shall be responsible for the company. We are afraid, there is no substance in this contention. There is nothing in the document to show that the nomination is effective not only for the registered offence of the company at Bombay but also for all its branches in different States. Such a construction would, in our opinion, render the Explanation to S.17(2) wholly illusory.

"para14 : Where there is a large business

organisation with a widespread network of sales organisation throughout the country, it ought to nominate different persons for different places of face the consequences set forth in S.17(1) (a) (ii). The explanation appended to S.17(2) does, in terms, contemplate that where a company has different establishments or branches or different units in any establishment or branch, it may nominate different persons in relation to different establishments or branches or units and the person so nominated in relation to any establishment or branch or unit shall be deemed to be the person responsible in respect of such establishment or branch or unit. The language of the Explanation shows a purpose and, therefore, a construction consistent with that purpose must reasonably be placed upon it.

"para15 : We are clear that the Explanation to S.17(2) although in terms permissive, imposes a duty upon such a company to nominate a person in relation to different establishments or branches or units. There can be no doubt that this implies the

performance of a public duty, as otherwise, the scheme underlying the section would be unworkable. The case in our opinion, comes within the dictum of Lord Cairns in *Julius V. Lord Bishop of Oxford*, (1874-80) 5 AC 214 :

“There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so.”

The Explanation lays down the mode in which the requirements of S.17(2) should be complied with. Normally, the word 'may' implies what is optional, but for the reasons stated, it should in the context in which it appears, mean 'must'. There is an element of compulsion. It is a power coupled with a duty. In *Maxwell on Interpretation of Status*, 11th Edn. at p.231, the principle is stated

thus:

“Statutes which authorise persons to do acts for the benefit of others, or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they 'may' or 'shall, if they think fit', or, 'shall, have power', or that 'it shall be lawful' for them to do such acts, a statute appears to use the language of mere permission, but it has been so often decided as to have become an axiom that in such cases such expressions may have – to say the least – a compulsory force, and so would seem to be modified by judicial exposition.” (Emphasis supplied). Though the company is not a body or authority, there is no reason, why the same principle should not apply. It is thus wrong to suggest that the Explanation is only an enabling provision, when its breach entails in the consequences indicated above. It is not left to one's choice, but the law makes it imperative. Admittedly, M/s. Ahmed Domar Bhoi

had not at the material time nominated any person, in relation to their Delhi branch. The matter is, therefore, squarely covered by S.17(1)(a)(ii)."

Thus, it was bounden duty of the petitioners to nominate the responsible person for the conduct of the business. In absence of any such nomination, the responsible person have to face the criminal prosecution and the proviso to Section 17(i)(b) alone, in absence of any positive proof cannot entitle the petitioners to be discharged.

12. The Apex Court in case of **U.P. POLLUTION CONTROL BOARD Vs. M/S. MODI DISTILLERY AND OTHERS**, reported in AIR 1988 SC p.1128, while dealing with similar provision under Section 47 of the Water (Prevention and Control of Pollution) Act observed in para 5 as under:-

"Para 5: On plain reading of sub-s.(1) of S.47 of the Act, where an offence has been committed by a company, every person who at the time of commission of the offence was 'incharge of and responsible to' the company for the conduct, of the business of the company, as well as the company, shall be deemed to

be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Proviso to sub-s(1) however engrafts an exception in the case of any such person if he were to prove that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. It would be noticed that sub-s.(1) of S.47 is much wider than sub-s.(4) of S.17 of the Prevention of Food Adulteration Act, 1954 which fell for consideration in I.K. Nangia's case. Furthermore, proviso to sub-s.(1) shifts the burden on the delinquent officer or servant of the company responsible for the commission of the offence. The burden is on him to prove that he did not know of the offence or connived in it or that he had exercised all due diligence to prevent the commission of such offence. The non obstante clause in sub-s(2) expressly provides that notwithstanding anything contained in sub-s.(1), where an offence under the Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or, is

attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence, and shall be liable to be proceeded against and punished accordingly."

13.The Apex Court in case of **R. BANERJEE AND OTHERS VS. H.D. DUBEY AND OTHERS**, reported in AIR 1992 SUPREME COURT P.1168 has held that where no person has been nominated under Section 17, every person, who at the time of commission of offence was incharge and responsible to the company for the commission of offence, shall be proceeded against and punished for the same. In such cases, the accused can prove his innocence by proving that offence was committed without his knowledge and notwithstanding of due diligence to prevent it.

14.In view of the aforesaid discussion, it becomes clear that the petitioners have no right to be discharged at the threshold of the trial only on the basis of the proviso to Section 17(i)(b). It goes without saying that the proviso under Section

17(i)(b) would be available to the accused petitioners during trial, wherein, they will have the opportunity to prove that the offence alleged was committed without their knowledge and despite their due diligence to prevent it. At the threshold of the trial and in absence of any positive evidence suggesting the absence of knowledge on their part and due efforts of preventing the offence alleged, the accused petitioners have no right to be discharged.

15. This court under Article 227 of the Constitution of India is not inclined to interfere with the order of learned trial Court and that of learned revisional court. Hence, the petition deserves to be dismissed and is dismissed accordingly. Rule discharged. Interim relief granted earlier, stands vacated.

16. Learned counsel for the petitioners submits that the interim relief granted earlier shall be continued for a period of 6 weeks. The request is rejected as trial is pending since long.

(S.R.BRAHMBHATT, J.)

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